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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VINCENT ERNEST MARQUEZ, Defendant and Appellant.	H033995 (Santa Cruz County Super. Ct. No. WF00282)

I. STATEMENT OF THE CASE

A jury convicted defendant Vincent Ernest Marquez of residential burglary and found true an allegation that during the burglary someone other than an accomplice was present. (Pen. Code, §§ 459, 667.5, subd. (c).)[1] The jury also convicted defendant of receiving stolen property. Thereafter, the court found that defendant had three prior strike convictions and five prior felony convictions for which he had served prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b).) The court sentenced defendant to a term of 44 years to life.

On appeal from the judgment, defendant claims the prosecutor's use of peremptory challenges to dismiss prospective Hispanic jurors violated his federal and state constitutional rights. He also claims the trial court erred in (1) admitting evidence

[1] All unspecified statutory references are to the Penal Code.

of a 17-year-old prior conviction for residential burglary, (2) suggesting to the victim that defendant was the person she had seen outside her residence before the burglary, and (3) failing to give instructions on the use of accomplice testimony.

We affirm the judgment.

II. FACTS

At around 11:00 a.m., on May 9, 2008, Alejandra Sanchez was alone watching TV in the bedroom of her home on Highway 129 in a rural area of Watsonville. She heard a knock on the front door. When she looked out a window, she saw a stranger whom she later identified as defendant. She immediately checked the back door to see that it was locked. She then peered out a bathroom window and saw defendant and another man and a woman walking down her driveway toward the back of the house. She later identified the other man as Ruben Tavera and the woman as S.J. The three people came onto her back deck, and one of the men approached the screen door. Mrs. Sanchez thought she saw a third man and then heard the noise of someone trying to pry open a window screen in the kitchen. When she heard the screeching sound of the window being pried open, she fled to the bedroom and locked the door. She called her husband and then 911. Before police arrived, someone tried to open her bedroom door, and she heard doors slamming and voices and footsteps inside the house.

About nine minutes after Mrs. Sanchez called 911, Santa Cruz County Deputy Sheriff Brian Erbe arrived at the scene. He saw two men, whom he later identified as Ruben Tavera and defendant, walking toward him on the driveway and ordered them to stop. Tavera complied, but defendant fled toward the back of the house and disappeared. Several seconds later, he reappeared on the other side of the house, ran toward a fence, and tossed something into a field. Defendant then disappeared behind the house. At trial, Deputy Erbe was absolutely certain that defendant was the person he had seen flee and toss something into the field.

Around the time defendant disappeared from Deputy Erbe's sight, Officer Brian Fulgoni of the Watsonville Police Department was driving on a dirt road alongside a field behind the house. He saw a man who matched the description of the fleeing suspect. He got out of his car, chased after him, and ordered him to stop. The man, whom he later identified as defendant, complied and was arrested.

Deputy Erbe took custody of defendant and brought him to Mrs. Sanchez, who identified him as the person she had seen knocking on her door. Later, Tavera and S.J. were brought to her, and she identified them. In the field where Deputy Erbe had seen defendant toss something, he found 11 pieces of jewelry and a jewelry box. Marisela Rocha, who lived with Mrs. Sanchez, identified these items as hers and said that she had kept them in her bedroom.

About an hour after the burglary, the police stopped a car near the scene. Tavera's sister was driving it, and S.J. was a passenger. At trial, S.J. admitted that she knew defendant and Tavera. She said that they had picked her up that morning, driven to the house, and walked toward it. However, she said that she was the one who had knocked on the door. She denied that she entered the house or walked toward the back. She said that when no one answered the door, she called Tavera's sister, who came and picked her up. She could not recall what defendant and Tavera did after that, although defendant said he was there to look for a job in the fields.[2]

At trial, to prove intent, the prosecutor introduced evidence that in 1991, defendant was convicted of residential burglary. Monterey County Deputy Sheriff Roy Martinez testified that on July 8, 1991, he arrived at an apartment building where a burglary was reportedly in progress. The building was surrounded by a wood fence and abutted land through which ran an irrigation canal. Deputy Martinez entered one of the units and found a broken window in a back bedroom and glass on the floor. He saw a man, later

[2] In a juvenile proceeding, it was alleged that S.J. committed the burglary, and the allegation was found true.

identified as defendant, outside the window walking on a levee and carrying a box. A woman there said that earlier she had seen that man in her apartment. Deputy Martinez pursued and arrested him. The box contained a VCR. Shoe prints outside the broken window matched defendant's shoes, and there was evidence that someone had crawled under a fence surrounding the property.

III. UNCONSTITUTIONAL USE OF PEREMPTORY CHALLENGES

Defendant contends that the prosecutor violated his federal and state constitutional rights by exercising her peremptory challenges based on group bias to remove three prospective Hispanic jurors.

A. Applicable Principles

Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).)

In *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*), the court reiterated the procedure and standard to be employed by trial courts when a defendant makes a *Batson-Wheeler* claim of discriminatory removal. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Id*. at p. 168.)

A defendant satisfies the first step "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson, supra,* 545 U.S. at p. 170.) If he or she does so, then the prosecutor must state adequate reasons for the peremptory challenges. At step three, "the trial court 'must make "a sincere and

reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . ." [Citation.]' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.)

"The existence or nonexistence of purposeful racial discrimination is a question of fact." (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) On appeal, "[w]e review a trial court's ruling at step three for substantial evidence." (*People v. Watson* (2008) 43 Cal.4th 652, 673.)

B. Voir Dire of Prospective Jurors

The prosecutor challenged three prospective jurors with Hispanic surnames: Mr. R., Mr. S., and Ms. G.

1. Mr. R.

During voir dire, the court explained that a defendant is presumed innocent, does not have to present any evidence, and can simply rely on the prosecutor's failure to prove guilt. The court asked prospective jurors if they had a problem with that. Mr. R. initially said, "I think that if he wants to be claimed innocent, he should at least produce something that he's innocent." Later, however, he said that if the law says a defendant does not have to, then he would not require it.

The court also explained that circumstantial evidence does not directly prove a fact but is an equally reliable method of proof. As an example, the court stated that if the question is whether a person had been swimming, and a witness testified that he saw the person standing in a dripping wet bathing suit, and wet footprints led from the pool to the person, the testimony would constitute circumstantial evidence that the person had been swimming. The court asked if jurors could follow instructions about circumstantial evidence.

Mr. R. said, "I think so but I'm still questioning the fact that I—that example you see a guy wet out on a swimming pool; that doesn't imply right there that he was swimming. What if he just came out of the shower or something like that? You know, that's what I was thinking."

Noting this response, the prosecutor asked Mr. R. if he could simply listen to the evidence and refrain from speculating. He responded, "I think. I'm naturally curious. I mean, when something brings, you know, you got to question it, but I think I can manage that."

The prosecutor explained that some questions might not be answered, and although one might be curious, he or she must keep that separate. Mr. R. thought he could do so. The prosecutor said now was the time to decide rather than during trial. Mr. R. said, "[I]t's just like if he says a statement and then you think about it and the question about the—where the crime was committed, I'm also thinking about it right now." He continued, "It's close. So I don't really know. I can't really answer that right now." The prosecutor asked Mr. R. where he lived. Mr. R. said he lived on Lincoln where it crosses Riverside Road (Highway 129) in Watsonville. He said he usually takes walks all the way out Highway 129, but he did not know the specific address where the crime occurred. Mr. R. had initially said that if he were selected as a juror, he did not know whether he would walk by the scene or be able to set aside his knowledge of the area because "[i]t's pretty curious right now." However, he later said that he would not go by the scene.

2. Mr. S.

During voir dire, prospective jurors were asked whether they had had any bad experiences with law enforcement that would affect their view of an officer's credibility at trial. Mr. S. explained, "I've had a bad past history with gangs and drugs. So, I mean, I mean, I'm on the other side of positive thinking now but back in the days I did have a lot of hatred stories with the law." He recognized another deputy district attorney in the

courtroom but could not recall whether she had prosecuted him. He reiterated that he had been "really lost in gangs at that time." Now that he had been clean and sober and away from gangs for some time, he could put his previous negative feelings aside.

3. Ms. G.

During voir dire, the court asked prospective alternate jurors whether there was any reason they might not be able to be impartial. Ms. G. said that she knew the District Attorney Bob Lee because he had prosecuted her nephew, who had been sent to prison for 15 years. However, she said she would not hold it against the prosecutor in this case. The prosecutor noted that Ms. G. had taken some time to answer whether she would hold against her what her boss, District Attorney Bob Lee, had done to her nephew. Ms. G. responded, "The reason is you base—they sent my nephew for 15 years in prison. They let him out for six months then resend him again for another two years. So I'm against that. You know, why did they send him for another two years when he already paid for 15 years and the judge was ready to let him go, but the District Attorney, that was again not Bob Lee, the one—the defender, he was the one against my nephew. He said need to pay another five years more." She then said she was not "against Bob Lee" and would not hold feelings for or against defendant or the prosecutor.

C. The *Batson-Wheeler* Motion

After the prosecutor challenged Ms. G., defendant claimed the prosecutor had "systematically removed all Hispanics from the . . . jury."

The court noted that the prosecutor had not challenged Ms. A., a Hispanic woman, who had already been sworn in as a juror. For this reason, the court found that defendant had failed to make a prima facie showing of purposeful discrimination.

Later, because Ms. A. had previously informed the court that she had just been burglarized and could not concentrate or be an effective juror, the court, on its own motion, excused her.

In response and because her use of challenges might end up before an appellate court, the prosecutor volunteered to explain why she had challenged the three Hispanic jurors. She said that Mr. R. lived near the scene of the crime and said he would try not to walk by it. Given his response to the court's circumstantial evidence example, the prosecutor categorized him as a person "who thinks too much." Concerning Mr. S., the prosecutor cited his extensive history with law enforcement and noted that he had tattoos on his hands. She did not believe that he could fairly judge the credibility of law enforcement officers. Concerning Ms. G., the prosecutor noted that she was very close to her nephew who had been imprisoned, and she had attended a hearing only nine months before. The prosecutor felt that she was too close to that proceeding on the side of the criminal defense.

Defendant challenged the prosecutor's reasons. He asserted that Mr. R. lived miles from the scene of the crime. He asserted that Mr. S. did not have an arrest history, and it was common to have tattoos. And as to Ms. G., he noted that she said she considered District Attorney Bob Lee a friend.

The court rejected defendant's arguments. It again found that he had not made a prima facie showing. It also found that the prosecutor had provided valid, neutral, and nondiscriminatory reasons for excluding the three prospective jurors.

D. Failure to Make a Prima Facie Showing

In reviewing a finding that the defendant failed to make a prima facie showing, we "consider the entire record of voir dire of the challenged jurors" (*People v. Gray* (2005) 37 Cal.4th 168, 186 (*Gray*)), and we "will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (*People v. Farnam* (2002) 28 Cal.4th 107, 135; accord, *People v. Hoyos* (2007) 41 Cal.4th 872, 900 (*Hoyos*); *People v. Guerra* (2006) 37 Cal.4th 1067, 1101.) In this regard, we note that a prosecutor's reasons for exercising a peremptory challenge "need not be sufficient to justify a challenge for cause." (*People v. Turner* (1994) 8

Cal.4th 137, 165, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) "Jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*Ibid*.)

Concerning Mr. R., voir dire revealed that he initially thought that a defendant should have to present some evidence to show his innocence. However, if the law did not require it, then he could follow the law. Mr. R. also said that he was naturally curious and questioned things when they are brought up. His response to the court's circumstantial evidence example reflected a tendency to speculate. However, he said that he could manage not to speculate despite his curiosity. Finally, Mr. R. said he lived in Watsonville and took walks out Highway 129. At first, he did not know whether he would visit the scene, but he later said he would not even think of doing so.

Given this voir dire, a prosecutor reasonably could think that Mr. R. might be a potentially problematic juror because he was too imaginative, free-thinking, and curious, and a person whose personal views of the law were not always correct. A prosecutor could further question whether Mr. R., despite his assertions to the contrary, could and would follow instructions that seemed to go against the grain of his own legal instincts, not speculate about missing evidence, and resist his curiosity about the scene of the crime.

Concerning Mr. S., voir dire revealed that he had an extensive history with drugs and gangs, he had tattoos, and he admitted having had "a lot of hatred stories with the law." Notwithstanding Mr. S.'s assertions about being clean, sober, and law-abiding for many years, a prosecutor reasonably could decide against seating any juror with an extensive history of unlawful drug-related activity and gang participation and who had once had strong, negative feelings toward law enforcement. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 703, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [proper to challenge juror with negative experiences of the

criminal justice system]; *People v. Walker* (1988) 47 Cal.3d 605, 625 [negative experiences].)

Concerning Ms. G., voir dire revealed that she was close to her nephew and upset that he had been prosecuted, imprisoned, released, and recently reimprisoned. A prosecutor reasonably could view these circumstances as potent emotional reasons for Ms. G. to harbor anti-prosecutorial and anti-law enforcement feelings. Although Ms. G. said she would not hold what had happened to her nephew against the prosecutor, a prosecutor could question whether she could and would be able to do so and for that reason not want her on the jury. (See, e.g., *People v. Roldan*, *supra*, 35 Cal.4th at p. 703 [negative experience with justice system]; *Wheeler*, *supra*, 22 Cal.3d at p. 277, fn. 18 [negative experience of a relative].)

In sum, the record before us "suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (*People v. Farnam*, *supra*, 28 Cal.4th at p. 135.)

Defendant argues that where, as here, a prosecutor excuses all or a significant majority of Hispanic prospective jurors, it is always reasonable to infer an improper group-based purpose and thereby make a prima facie showing.

However, as noted, a prosecutor's dismissals cannot be viewed in isolation but must be considered in light of the entire voir dire. Thus, in *Hoyos*, *supra*, 41 Cal.4th at pages 901-903, the Supreme Court concluded that the dismissal of all four Hispanic prospective jurors did not constitute a prima facie showing because the record suggested reasonable race-neutral reasons for each dismissal. Similarly, in *Gray*, *supra*, 37 Cal.4th at pages 187-188, the Supreme Court concluded that the dismissal of two of four African-American prospective jurors did not constitute a prima facie showing because the record revealed plausible reasons to remove both jurors. (See also, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1154 [no prima facie showing]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 406.)

Here too, voir dire revealed reasonable, neutral grounds to excuse the three Hispanic jurors. Moreover, as the court observed, the prosecutor did not exercise a peremptory challenge to excuse Ms. A., who was also Hispanic. Under the circumstances, we agree with the trial court's conclusion that defendant failed to make a prima facie showing of improper discrimination.[3]

IV. PRIOR BURGLARY CONVICTION

Defendant contends that the court erred in admitting evidence of his 1991 residential burglary conviction under Evidence Code section 1101, subdivision (b), to prove intent. He argues that his prior conviction was too remote and too dissimilar to have any probative value. Moreover, he argues that his intent was not in issue and, if it were, the court should have limited the evidence to the record of his prior conviction instead of allowing Deputy Martinez to testify.

Evidence Code section 1101, subdivision (b) permits the introduction of otherwise inadmissible evidence that the accused "committed a crime" if it is "relevant to prove some fact (such as motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code § 1101, subd. (b), italics added; *People v. Pijal* (1973) 33 Cal.App.3d

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[3] Defendant argues that because the court "solicited" the prosecutor's reasons for excusing the three prospective jurors, the issue of whether he satisfied his initial burden of making a prima facie case is now moot. We disagree. The trial court found that defendant had failed to make a prima facie showing. It did not "solicit" the prosecutor's reasons; rather, to make the record complete for purposes of appeal, the prosecutor volunteered her reasons. Thereafter, the court reiterated that defendant had not made a prima facie showing. It then added that the prosecutor's stated reasons were valid.

In any event, the reasons that the prosecutor provided track those which, as discussed above, a prosecutor reasonably and properly could have relied on to dismiss the jurors. Neither defendant's tortured argument that it was not plausible for the prosecutor to think that Mr. R. might visit the scene nor his argument that having tattoos is meaningless convince us that the prosecutor's stated reasons were invalid or that those reasons were a pretext for excusing most of the Hispanic prospective jurors. Moreover, defendant does not argue that the prosecutor's reason for excusing Ms. G. was either invalid or pretextual.

682, 691.) We review the trial court's ruling for abuse of discretion. (*People v. Kelly* (2007) 42 Cal.4th 763, 783.)

Defendant claims that being 17 years old, the prior conviction was too remote to be probative.

The staleness or remoteness of a prior conviction is generally a pertinent consideration if, thereafter, the defendant has lived a legally blameless life. (*People v. Harris* (1998) 60 Cal.App.4th 727, 739; *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590; *People v. Boyd* (1985) 167 Cal.App.3d 36, 44; *People v. Kemper* (1981) 125 Cal.App.3d 451, 454-455.) Moreover, there is no bright-line rule regarding remoteness, and long periods between a prior and current offense do not invariably preclude the admission of the prior. (See, e.g., *People v. Branch* (2001) 91 Cal.App.4th 274, 284-286 [prior act 30 years earlier admissible]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [prior act 18 to 25 years earlier admissible]; *People v. Soto* (1998) 64 Cal.App.4th 966, 991-992 [passage of substantial time does not automatically signify that prior incident is prejudicial].)

Here, the record reveals that for his 1991 conviction, defendant was sentenced to 30 years in prison, later reduced to 25. After his release, he was convicted of felonies committed in 2005 and 2006. He committed the instant offense in 2008. Thus, during the 17-year interval between his prior and current offenses, defendant was incarcerated an unspecified amount of time and, after his release, did not lead a legally blameless life. Under the circumstances, defendant does not convince us that the court abused its discretion in finding that the remoteness of the prior burglary did not so diminish its probative value as to render it inadmissible. (Cf. *People v. Davis* (2009) 46 Cal.4th 539, 602 [17 years not remote where defendant free for only three years].)

Defendant claims that the prior offense was too dissimilar to the instant offense to be admissible.

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) While relevancy requires a showing of some similarity between the prior misconduct and the current charge, "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such act. . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Here, both burglaries involved dwellings located in areas that abutted non-residential, open space; the burglaries occurred during the day; entry was attempted, if not gained, through windows that were broken or showed signs of force; defendant was in the area around the time of each burglary; he fled into the open space around both dwellings; and when he fled, he carried stolen property with him.

Defendant points out that there are a number of dissimilarities between the burglaries. However, we do not find that these dissimilarities predominate over the similarities. Nor do we find that the similarities were insufficient as a matter of law to support an inference that defendant probably harbored the same intent to steal in both instances. (See, e.g., *People v. Jones* (2011) 51 Cal.4th 346, 370-371 [evidence of defendant's participation in robbery sufficiently similar to charges of home invasion and murder]; *People v. Daniels* (2009) 176 Cal.App.4th 304, 315-316 [sufficient similarity to

show intent to rape].) Accordingly, defendant does not establish that the trial court abused its discretion in finding the burglaries sufficiently similar to be admissible to show intent.

Defendant notes that his defense centered on arguing that Mrs. Sanchez misidentified him, he was not involved in the burglary, and there was no evidence that anyone had entered the house. Given his defense, defendant claims his intent was not truly at issue because if the jury found that he was involved in the burglary, it would have had no basis to find that he did not harbor the requisite intent.

To prove that defendant committed burglary, the prosecutor had to prove that he entered Mrs. Sanchez's house "with intent to commit grand or petit larceny or any felony." (§ 459.) By pleading not guilty, defendant put all elements of the charged burglary, including intent, in dispute. (*People v. Scott* (2011) 52 Cal.4th 452, 470.) His tactical decision not to directly contest intent as part of his defense did not relieve the prosecution of its burden to prove it. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.) Thus, the evidence was admissible to prove intent even if defendant did not explicitly claim that he lacked the requisite intent.

We acknowledge that where there is unassailable evidence of defendant's criminal intent such that that element is not reasonably in dispute, then there is no predicate for admitting uncharged crimes evidence to prove it. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423; *People v. Earle* (2009) 172 Cal.App.4th 372, 391.) Here, however, the evidence established that someone had entered Mrs. Sanchez's house and taken Ms. Rocha's property. There was also evidence that defendant was at the house at that time. And there was evidence that he had had possession of Ms. Rocha's property. Although the evidence supported an inference concerning defendant's intent at Mrs. Sanchez's house, the trial court reasonably could have concluded that his intent remained sufficiently in dispute to justify the admission of additional evidence to prove it.

Noting that the prosecutor rejected his offer to stipulate to the fact that he previously had been convicted of burglary of an inhabited dwelling house, defendant suggests that the court abused its discretion in not requiring the prosecution to accept the stipulation or in not limiting the evidence to the official record of his prior conviction.

"The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; accord, *People v. Sakarias* (2000) 22 Cal.4th 596, 629; *People v. Scheid* (1997) 16 Cal.4th 1, 16-17.)

Here, defendant's prior conviction had persuasive force because of the similarities between it and the instant offense. Indeed, the standard instruction for prior convictions tells jurors to consider "the similarity or lack of similarity" between the prior offense and the charged offense in evaluating the evidence. (See CALCRIM No. 375.) Under the circumstances, we do not find that the prosecution was compelled to accept defendant's stipulation; nor do we find that the court abused its discretion in not forcing her to do so.

Moreover, we would find any error in this regard to be harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant claims that "[t]he obvious danger of allowing . . . live testimony is that because he was previously convicted of stealing a box of property from a home, the jury would presume he must likewise have done the same here." Defendant's claim ignores the fact that the court advised the jurors that they could, but were not required to, consider the evidence for the limited purpose of deciding whether defendant acted with the requisite intent and prohibited them from considering it for any other purpose or concluding that defendant had a bad character or propensity to commit burglary. We presume jurors are able to follow such instructions. (*People v. Horvater* (2008) 44 Cal.4th 983, 1005.)

Defendant claims that even if the evidence was admissible to prove intent, the court abused its discretion in not excluding it under Evidence Code section 352 because it was more prejudicial than probative.[4]

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) "Rulings made under [section 352] are reviewed for an abuse of discretion. [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1004.)

In determining whether the probative value of an uncharged offense is outweighed by its potential prejudice, a court looks at the inflammatory nature of that evidence, the degree of certainty of its commission, the consumption of time, and remoteness, as well as other unique factors presented. (*People v. Harris*, *supra*, 60 Cal.App.4th at pp. 738-740.)

Evidence is not prejudicial simply because it is damaging to the defense. Rather, "[e]vidence is prejudicial within the meaning of Evidence Code section 352 if it ' "uniquely tends to evoke an emotional bias against a party as an individual" ' [citation]

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[4] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

or if it would cause the jury to ' " 'prejudg[e]' a person or cause on the basis of extraneous factors." ' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 475.)

Here, the evidence of defendant's prior burglary was not inherently inflammatory; nor was it more inflammatory than the evidence of the instant offense. Moreover, the jury learned that that the conduct described by Deputy Martinez resulted in a burglary conviction. Finally, the presentation of Deputy Martinez's testimony did not take up an undue amount of time. We further note that the court intended to give an instruction requiring the jury to limit its consideration of the evidence to the issue of intent and not consider it for any other purpose.

Under the circumstances, defendant does not establish that the court's ruling under Evidence Code section 352 was arbitrary, capricious, or patently absurd. Therefore, we find no abuse of discretion.[5]

V. UNDULY SUGGESTIVE IDENTIFICATION PROCEDURE

Defendant contends that the trial court violated his right to due process because at trial, before Mrs. Sanchez identified him, the court unduly, unnecessarily, and unreliably suggested that he was the perpetrator.

The record reveals that when Mrs. Sanchez took the stand, the court stated, "Miss [*sic*] Sanchez, Miss Dunlap is going to ask you some questions. Then Mr. Marquez if he has any will have the opportunity to question you as well."[6]

Defendant concedes that the court's comment was inadvertent. Nevertheless, he claims that it undermined his defense, part of which was that Mrs. Sanchez misidentified him at the scene of the crime. He argues that by identifying him "by name," the court

[5] Given our conclusion, we need not address defendant's claim that the *erroneous* admission of the evidence compels reversal.

[6] Defendant later moved for a mistrial on the ground that the court's statement tainted Mrs. Sanchez's in-court identification. The court denied the motion. We independently review a trial court's ruling that the identification procedure was not unduly suggestive. (*People v. Avila* (2009) 46 Cal.4th 680, 698-699.)

effectively "informed Sanchez that he was the person on trial who [*sic*] she previously identified in connection with the incident, so she knew that when asked she should identify him."

" 'Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable.' [Citation.]" (*People v. Avila*, *supra*, 46 Cal.4th at p. 698.) The constitutional concern is whether the identification procedure was so impermissibly suggestive that it creates a very substantial likelihood of misidentification under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989; *Simmons v. United States* (1968) 390 U.S. 377, 384.) A defendant bears the burden to establish that an identification procedure was so unfair that it violated his or her right to due process. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Sanders* (1990) 51 Cal.3d 471, 508.)

" 'In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' [Citation.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413; accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1250-1251.)

Here, when Mrs. Sanchez was called to the stand, Ms. Dunlap was at her table, and defendant at his.[7] Although it was unnecessary for the court to refer to defendant by name, it did so only to explain to Mrs. Sanchez what was going to happen and who would be asking her questions. Nothing the court said suggested that either Ms. Dunlap or defendant would ask her to identify the perpetrator and whether she saw that person in court. Nor did the court's comment identify defendant as *the* Mr. Marquez who was on trial for allegedly burglarizing her home. For all Mrs. Sanchez might have known, the person who might be asking her questions simply shared the same name as the perpetrator.

As a potentially unduly suggestive identification procedure, the court's explanatory comment pales compared with a single-person show up at the scene of a recent crime where the defendant is handcuffed. And yet even that procedure is not automatically deemed unfair or automatically suggestive. (E.g., *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; *People v. Gomez* (1976) 63 Cal.App.3d 328, 335-337.)

Finally, even if we considered the court's comment to be unduly suggestive, we would not find a violation of due process. As noted, defendant must also show that Mrs. Sanchez's later in-court identification was unreliable under the totality of circumstances.

The record reveals that Mrs. Sanchez saw defendant during daylight hours twice at her house from relatively close distances, first knocking at her front door and then later during an in-field identification shortly after he was arrested. She showed no hesitation in identifying him or the other two persons she had seen with him. Moreover, it is undisputed that defendant was around her house at the time of the burglary. These

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[7] Before trial, the court granted defendant's *Faretta* (*Faretta v. California* (1975) 422 U.S. 806) motion to represent himself. He did so and demonstrated exceptional knowledge of the law and procedure and very competent legal skills, thereby refuting the old proverb that one who is his own lawyer has a fool for a client. (See *id.* at p. 852 (dis. opn. of Blackmun, J.).)

circumstances establish that at trial, Mrs. Sanchez had substantial and reliable grounds to re-identify defendant, and those grounds were wholly independent of the court's brief and unrelated reference to the name of the man sitting at the table. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 990 [observation of defendant during commission of crime constituted an independently reliable source for identification].)

Defendant argues that the court's suggestive identification was "problematic" because of inconsistencies in Mrs. Sanchez's description of the perpetrator's clothing and the existence of facial hair. Although such inconsistencies are a factor to consider in determining whether Mrs. Sanchez's in-court identification was unreliable, they are not determinative. Thus, defendant fails to demonstrate that the court's reference to his name constituted an unduly suggestive identification procedure or that as a result of the court's comment, Mrs. Sanchez's in-court identification was so unreliable as to violate defendant's right to due process.

VI. ACCOMPLICE INSTRUCTIONS

Defendant contends, and the Attorney General concedes, that the trial court should have given an accomplice instruction to the effect that jurors should view with caution the testimony of S.J. that tended to incriminate defendant. (*People v. Williams* (2010) 49 Cal.4th 405, 455-456; see CALCRIM No. 335.)[8]

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) Clearly, S.J. was liable to prosecution for the burglary. (See fn. 2, *ante*.) Thus, we agree that the court erred in failing to instruct. The court's omission is subject to harmless error review under *People v. Watson, supra*, 46 Cal.2d 818.

[8] CALCRIM No. 335 states, in pertinent part, "[A]ny testimony of an accomplice that tends to incriminate the defendant should be viewed with caution."

According to defendant, S.J. incriminated defendant by testifying that she knew him, he went with her and Tavera to Mrs. Sanchez's house, she knocked on the door, and later the juvenile court found her "guilty" of burglary. He argues that her testimony established defendant's association with her and Tavera, and had jurors viewed it with caution, they could have believed that he had arrived at Mrs. Sanchez's house by himself and for an innocent reason.

Apart from S.J.'s testimony, there was substantial, if not overwhelming, evidence to corroborate S.J.'s testimony that defendant was present at the scene and to establish his participation in the burglary. Mrs. Sanchez identified him twice at the scene of the crime. Deputy Erbe saw defendant with Tavera in the driveway; defendant fled when ordered to stop; he was seen tossing what turned out to be stolen property over a fence into a field; and he was later arrested in or near the field.

S.J.'s testimony that she knew defendant had little or no incriminatory value, and defendant had ample opportunity to impeach her if that were not true. Moreover, the fact that she was held responsible for the burglary was undisputed.

Moreover, the court instructed the jury that in assessing the credibility of a particular witness it should consider whether the witness had been convicted of a felony, committed a crime or other misconduct, or had a personal interest in the matter. (CALCRIM Nos. 226, 316.) These instructions were sufficient to inform the jury to view S.J.'s testimony with care and caution as contemplated by the accomplice instruction. (See *People v. Lewis* (2001) 26 Cal.4th 334, 371.)

Under the circumstances, the failure to instruct jurors to view the incriminating parts of S.J.'s testimony with caution was harmless, and it is not reasonably probable that the jury would have reached a verdict more favorable to defendant had the instruction been given. (E.g., *People v. Lewis*, *supra*, 26 Cal.4th at p. 371; *People v. Hill* (1993) 12 Cal.App.4th 798, 808-809.)

VII. DISPOSITION[9]

The judgment is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
ELIA, J.

_____
WALSH, J.*

[9] Given our discussion of the issues, we need not address defendant's claim that the cumulative effect of the court's numerous alleged errors compels reversal. Simply put, there were no multiple errors.

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.